

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID R. KING

Claimant

VS.

ANDERSON NEWS COMPANY

Respondent

AND

HARTFORD ACCIDENT & INDEMNITY

Insurance Carrier

Docket No. 233,037

ORDER

Respondent appealed Administrative Law Judge Bryce D. Benedict's Award dated February 2, 2001. The Board heard oral argument on August 22, 2001.

APPEARANCES

Claimant appeared by his attorney, Roger Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael Haight of Overland Park, Kansas.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties stipulated the claimant has a 17 percent permanent partial general body functional impairment.

ISSUES

The Administrative Law Judge determined claimant had sustained accidental injury arising out of and in the course of his employment on March 7, 1998, and respondent had failed to meet its burden of proof to establish claimant's consumption of alcohol contributed to the accident. The respondent requested review of that determination. Respondent contends claimant's consumption of alcohol contributed to the accident and the claim should be denied pursuant to K.S.A. 44-501(d)(2).

Conversely, the claimant contends the respondent failed to meet its burden of proof that the consumption of alcohol contributed to the accident and requests the Administrative Law Judge's decision be affirmed.

FINDINGS OF FACT

After reviewing the entire record and considering the arguments of the parties, the Board finds that the Administrative Law Judge's Award should be affirmed.

The Award sets out findings of fact and conclusions of law that are both accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings of the Administrative Law Judge as its own, as if specifically set forth herein.

The dispositive issue is whether claimant was impaired from his admitted consumption of alcohol prior to the motor vehicle accident and whether such consumption of alcohol contributed to the accident.

The burden is placed on the respondent to defeat a workers compensation claim based on claimant's intoxication.¹ The respondent contends claimant admitted he consumed alcohol prior to the vehicle accident and the investigating police officer's accident report notes alcohol contributed to the accident. Respondent argues the facts establish claimant consumed a sufficient amount of alcohol to be impaired and the officer's accident report provides sufficient evidence that alcohol contributed to the accident.

The claimant testified he had been drinking beer at a retirement party at his Air National Guard base. The retirement party began around 3 p.m. Claimant testified he had 2 or 3 glasses of beer. After the Guard meeting concluded, the claimant went to a local bar for a going away party for another soldier. Claimant arrived at the bar about 4:30 p.m. and had a few beers and left around 6 p.m. The claimant denied he was impaired or that he was experiencing any difficulties such as dizziness, slurred speech or inability to walk when he left the bar. No evidence was proffered to refute his contentions or to indicate he drove in an erratic fashion as he left to proceed to a warehouse to load some magazines.

Claimant testified it was raining hard and the wind was blowing hard. The windshield wipers were not making contact with the windshield and he was having trouble seeing so he tried leaning over to see out of the middle of the windshield when a gust of wind hit the van and the front tire went off the side of the road. Claimant tried to get the van back up on the road and when he did he went across the road, through a ditch and hit a tree.

¹See Poole v. Earp Meat Co., 242 Kan. 638, Syl. ¶4, 750 P.2d 1000 (1998).

The investigating police officer did not testify and while his report does contain a code designation that alcohol contributed, as the Administrative Law Judge noted, in the portion of the report titled "substance use" there was no notation inserted that alcohol was present or that alcohol contributed. Absent the officer's testimony it is unclear what facts he used to arrive at his conclusion and it is also unclear exactly what the officer intended when he completed the form.

The claimant denied he was impaired and described how the accident occurred. The weather reports corroborate the claimant's contention that it was raining and the wind was gusty. The emergency personnel's report makes no mention of claimant engaging in any behavior indicative of intoxication and instead indicates claimant was alert and cooperative.

The Board concludes the respondent has failed to meet its burden of proof that it is more probably true than not true, on the basis of the whole record, the claimant was impaired by alcohol or the alcohol contributed to the vehicle accident and affirms the Administrative Law Judge's Award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated February 2, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger Fincher, Attorney for Claimant
Michael Haight, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director